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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: EAC 02 032 56375 Office: VERMONT SERVICE CENTER Date: MAR 02 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a motel. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a manager. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition, and the AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel submits a brief and new evidence.

The regulation at 8 C.F.R. § 103.5(A)(2) states, in pertinent part:

> *Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(A)(3) states:

> *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because counsel provided new evidence. The motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied the pertinent law.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting

of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate eligibility beginning on the priority date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on June 2, 2000. The beneficiary's salary as stated on the labor certification is $675 per week, which equals $35,100 annually.

With the petition counsel submitted copies of the petitioner's 1999 and 2000 Forms 1120S U.S. Income Tax Return for an S Corporation.

The 1999 tax return, which covers the 1999 calendar year, shows that the petitioner declared an ordinary income from trade or business of $5,985 during that year. Counsel did not submit a copy of the petitioner's 1999 Schedule L. This office notes that, because the priority date is June 2, 2000, the petitioner's income and assets during 1999 are not directly relevant to the determination of the petitioner's ability to pay the proffered wage beginning on the priority date.

The 2000 tax return reflects that the petitioner declared ordinary income of $22. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of

$5,667 and current liabilities of $1,191, which yields net current assets of $4,476.

Because the petitioner submitted insufficient evidence of its ability to pay the proffered wage, the Vermont Service Center, on December 31, 2001, requested additional evidence. Specifically, the Service Center requested additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In addition, the Service Center requested that the petitioner provide copies of the 2000 Form W-2 Wage and Tax Statement showing wage payments to the beneficiary, if it had employed the beneficiary during that year.

In response, counsel submitted (1) copies of 2000 and 2001 Federal W-2 forms showing wage payments to the current manager of the motel, whom the beneficiary would allegedly replace; (2) a copy of the petitioner's 2001 Form 1120S U.S. Income Tax Return for an S Corporation; (3) a copy of a lease demonstrating petitioner's owner also owns the property the petitioner rents and upon which it conducts its business, (4) the petitioner's bank statements from May, June, July, and December 2000, as well as December 2001; and (5) an affidavit from the president of the petitioner/corporation. The petitioner provided no W-2 forms showing payments made to the beneficiary, apparently indicating that it did not employ the beneficiary during 2000.

The affidavit from the president of the petitioner/corporation states that he anticipates that $24,000 would be available because the beneficiary would replace another employee who was being paid that amount. The petitioner's president's affidavit further states that the petitioner/corporation pays $60,000 in rent, which is paid directly to the president of the corporation, and that the rent might be reduced as necessary to cover the proffered wage.

The 2000 and 2001 W-2 forms demonstrate that the petitioner is, as claimed, paying $24,000 to a current employee. Replacement of that employee would, in fact, free that amount.

The petitioner's 2001 tax return shows that the petitioner declared ordinary income from trade or business activities of $2,549. The corresponding Schedule L shows that the petitioner's current liabilities exceeded its current assets at the end of that year.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on May 10, 2002, denied the petition. The petitioner, through counsel, appealed. Counsel asserted on appeal that the

evidence demonstrates the petitioner's ability to pay the proffered wage. On January 24, 2003, the AAO dismissed the appeal.

With the present motion to reopen/reconsider, counsel submits a copy of the petitioner's 2002 Form 1120S U.S. Income Tax Return for an S Corporation. That return shows that the petitioner reported ordinary income of $28,799 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had $21,581 in current assets and $9,403 in current liabilities, which yields net current assets of $12,178.

Counsel asserts the following: (1) that the petitioner's depreciation deduction should be added to its income as part of the determination of the petitioner's ability to pay the proffered wage, (2) that the petitioner's bank statements show additional funds available to pay the proffered wage, (3) that, in addition to the employee whom the petitioner will replace and whose salary will then be available to pay the proffered wage, the petitioner's owner has also been paid for managing the business, and the amount which has been paid to him will also be available to pay the proffered wage, as the petitioner will also take over the duties of the owner, (4) that the rent of $60,000 which the petitioner pays for the use of its premises might be reduced as necessary to pay the proffered wage, (5) that, pursuant to *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), the ability of the beneficiary to generate additional income for the petitioner should also be considered, and (6) that the petitioner's business is improving and, pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the petitioner's reasonable expectations of increased profits justify disregarding its historically low income.

Further, counsel notes that according to his calculations, the amount which the petitioner has not shown the ability to pay is equal to, at most, $26.53 per day and asks, "Are we to believe that the company could not come up with $27.00 per day to make up the shortage?"

Further still, counsel finds fault with the statement of the director, at page four, paragraph four, of the decision dismissing the appeal, that "only approximately $11,000 of the petitioner's assets are available to pay the proffered wage." Counsel notes that the building housing the petitioner is worth $54,000 for tax purposes and is a 25-unit motel complex. Counsel asks "How could (the motel) be valued at only $11,000 . . . as alleged by the director?"

Finally, counsel submitted two non-precedent decisions; the facts

of which he asserts are similar to the facts of the instant case. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of non-precedent decisions is of no effect.

Counsel asserts that the petitioner's depreciation deduction should be added back to its net income as part of the determination of the ability to pay the proffered wage. A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1080 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel's reliance on bank account balances is also misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are preferred evidence of a petitioner's ability to pay a proffered wage. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

In the motion, counsel asserts that, in addition to replacing the petitioner's current full-time manager, the beneficiary will also take over managerial functions which have been performed by the petitioner's owner and for which the petitioner's owner was paid. Counsel points to the petitioner's Form 1120S returns' line 7,

which indicates that the petitioner paid compensation to officers of $11,000 during 1999, $12,000 during 2000, $12,000 during 2001, and $16,000 during 2002. Counsel indicates that those amounts were available to pay the proffered wage.

This office notes that counsel did not mention that the beneficiary would take over the petitioner's owner's managerial duties in the supporting materials submitted with the initial visa petition. Counsel also omitted this salient fact in the response to the December 31, 2001 Request for Evidence of the petitioner's ability to pay the proffered wage. Counsel did not assert the availability of those additional funds on appeal. Now, in a motion to reopen, counsel finally asserts that the beneficiary will take over the petitioner's owner's managerial functions and that the compensation to officers during various years was available to pay the proffered wage.

A petitioner raises questions of credibility when asserting a new claim on motion to reopen. Counsel provides no explanation for his failure to advance his claim on the initial petition, in response to the request for evidence, or on appeal. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner is obliged to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The regulation at 8 C.F.R. § 204.5(g)(2) does not encourage petitioners to hold evidence in abeyance and submit it on appeal or on post-appeal motion. Rather, it clearly states that evidence of the petitioner's ability to pay the proffered wage **must accompany** the petition. (Emphasis added.) In this case, the evidence submitted with the petition did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response to that finding, affirmed on appeal, counsel and the petitioner's owner have proposed a new source of funds never before mentioned in conjunction with this petition. Under these circumstances, this office does not find this novel assertion credible and declines to include any portion of the petitioner's compensation of officers in the determination of the ability to pay the proffered wage.

Counsel restates that that the petitioner's owner is also the owner of the building that the petitioner rents for its operations. Counsel reiterates that the petitioner's owner has

agreed to forego whatever portion of the rent is needed to pay the proffered wage.

A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the income and assets of the owners or stockholders and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter. The owner's income and assets shall not be considered in determining the petitioner's ability to pay the proffered wage.

The petitioner is obliged to demonstrate its ability to pay the proffered wage out of its own income or assets. Its funds are separate from those of its owner. A promise by the owner to pay the proffered wage out of his own income and assets is insufficient to demonstrate the petitioner's ability to pay the proffered wage. Similarly, the ability to pay the proffered wage cannot be demonstrated by the promise of the owner, or any other person, to forego payments to which he is entitled. The promise of the petitioner's owner to forego charging the petitioner rent, or to forgive a portion of the rent as necessary to pay the proffered wage, however this remission is structured, is of no effect.

Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered. Initially, this office notes that the AAO is not bound to follow the published decision of a United States district court in cases arising outside of that court's district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

Further, although a portion of the decision in *Masonry Masters* urges consideration of the ability of the beneficiary to generate income for the petitioner, that portion is clearly dictum, as the decision was based on other grounds. The court's suggestion appears in the context of a criticism of the failure of CIS to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage.

Finally, while the decision in *Masonry Masters* urges CIS to consider the income that the beneficiary would generate, it does not urge CIS to assume that the beneficiary would generate income and to guess at the amount. The petitioner has submitted

no evidence that the petitioner would generate additional income, and absent any such evidence, CIS will make no such assumption.

In the argument on appeal, counsel notes that the amount of the proffered wage that the petitioner has not demonstrated the ability to pay is quite small when divided by 365. Merely noting that division renders the proffered wage smaller is insufficient. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. In that context, counsel asks, "Are we to believe that the company could not come up with $27.00 per day to make up the shortage?"

This office shall not assume that the petitioner does or does not have the ability to make up that shortfall. The petitioner must demonstrate the ability to pay the proffered wage in order to render the petition approvable. No assumption is appropriate and none shall be made.

Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[1] or otherwise increased its net income[2], the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

In calculating the petitioner's ability to pay the proffered wage, CIS will first examine the net income reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *Aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the

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[1] The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

[2] The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

INS, now CIS, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

The priority date is June 2, 2000. The beneficiary's salary is $35,100 per year. During 2000, the petitioner is not obliged to demonstrate the ability to pay the entire proffered wage, but only that portion which would have been due if it had employed the beneficiary beginning on the priority date. On the priority date, 152 days of that 366-day year had elapsed. The petitioner must show the ability to pay the proffered wage during the remaining 214 days. The proffered wage multiplied by $214/366^{th}$ equals $20,522.85, which is the amount the petitioner must show the ability to pay during 2000.

A 2000 W-2 form submitted by counsel shows that the petitioner paid $24,000 to the employee whom the beneficiary will allegedly replace. The record contains no reason to doubt the petitioner's assertion that the beneficiary will replace that named employee. Therefore, the $24,000 paid to that employee would be available, if the petitioner employed the beneficiary, to pay the proffered wage. The petitioner has demonstrated the ability to pay the salient portion of the proffered wage during 2000.

During 2001, and ensuing years, the petitioner must demonstrate the ability to pay the entire proffered wage. During 2001, the petitioner declared ordinary income of $2,549. The petitioner ended the year with negative net current assets.[3] The petitioner

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[3] End-of-year net current assets are the taxpayer's end-of-year current assets, shown on Schedule L at lines 1(d), 2b(d), and 3(d), less the taxpayer's end-of-year current liabilities, shown on Schedule L at lines 16(d), 17(d), and 18(d). Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. Thus, if the net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The distinction between current assets and other assets also disposes of counsel's argument pertinent to the amount of the petitioner's assets available to pay the proffered wage. The decision is correct that, of the petitioner's $54,197 in 2001 end-of-year assets, only $11,188 are current assets. The balance is in real estate, which

has demonstrated that the beneficiary would replace an employee who earns $24,000 annually. That annual salary added to the petitioner's 2001 ordinary income equals $26,549, an amount less than the proffered wage. The petitioner has not demonstrated that it had any other funds available to pay the proffered wage during 2001. Thus, the petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002, the petitioner declared ordinary income of $28,799. That amount is insufficient to pay the proffered wage. The petitioner finished the year with net current assets of $12,178. That amount is also insufficient to pay the proffered wage.[4] The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

Counsel argues that the petitioner's business is improving and that, pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS should disregard the petitioner's historically low profits in light of the petitioner's reasonable expectations of increased profits in the future.

Matter of Sonegawa, Id. relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. During the year in which the petition was filed in that case the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

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includes both land and improvements thereto, in the amount of $43,009. That amount is not current, that is; it is not expected to be converted to cash within a year. It is not, therefore, available to pay the proffered wage and is not correctly a part of the determination of the petitioner's ability to pay the proffered wage.

This office also notes that counsel did not choose to clarify an issue raised in the decision dismissing the appeal. Counsel did not state why the petitioner, which pays rent for the building in which it conducts business, includes the value of real estate among its assets.

[4] Because of the nature of net current assets, they are not added to the petitioner's ordinary income, but are an alternative measure of the petitioner's ability to pay the proffered wage. The previous decision erred in adding the petitioner's 2002 ordinary income and net current assets and finding that the petitioner had demonstrated the ability to pay the proffered wage during that year.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if the petitioner could show that its low profits are uncharacteristic, occurred within a framework of profitable or successful years, and are unlikely to recur, then those low profits might be overlooked in determining its ability to pay the proffered wage. The facts in *Sonegawa* are distinguishable from the facts of the instant case. The petitioner has only been in existence for six years. No evidence has been submitted to show that the petitioner has ever posted a large profit. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The documentation submitted does not establish that the petitioner had sufficient available funds during 2001 or 2002 to pay the proffered salary. Therefore, the objection of the AAO has not been overcome on the motion.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

ORDER: The motion to reopen/reconsider is granted. The AAO's decision of January 24, 2003 is affirmed. The petition is denied.